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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 481st MEETING

Held at Headquarters, New York,
on Wednesday, 13 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

* No summary record was issued for the 480th meeting.

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference Services, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.30 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/XXV/CRP.2/Add.2)

1. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, referred the Commission to the report of the Drafting Group on the Model Law (A/CN.9/XXV/CRP.2/Add.2). The Drafting Group had decided that former article 18 should be inserted in the text as a footnote marked with an asterisk appearing after the title of chapter I. The text should be headed "Article X. Conflict of laws", and the phrase "for the purposes of article 4 (1)" in paragraph (2) should be deleted. It had also been decided to include article 17 as a footnote.

2. Mr. FUJISHITA (Japan) said that he did not oppose the text of article X, but felt that the wording of the footnote conveyed an implication that the Commission had been in favour of the adoption of the provision, whereas in fact a majority had opposed it. He therefore proposed that the wording at the beginning of the footnote should be changed to read: "The Commission suggests the following additional text for States that might wish to adopt it.".

3. Mr. DUCHEK (Austria) agreed that the wording might leave room for misinterpretation. He therefore supported the Japanese proposal, but felt that the Commission might go a little further by replacing the words "decided to provide" with the word "offers".

4. Mr. SCHNEIDER (Germany) and Mrs. FERNANDEZ DE GURMENDI (Argentina) supported the Japanese proposal.

5. The proposal was adopted.

6. The CHAIRMAN invited the Commission to consider the text article by article.

Article 1

7. Article 1 was adopted.

Article 2, paragraph (a)

8. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, noted that the Drafting Group had restored the wording of the beginning of paragraph (a) ("'Credit transfer' means ..."), which had previously appeared in the text.

9. Paragraph (a) was adopted.

Article 2, paragraph (b)

10. Paragraph (b) was adopted with minor drafting changes.

Article 2, paragraphs (c), (d) and (e)

11. Paragraphs (c), (d) and (e) were adopted.

Article 2, paragraphs (f) to (n)

12. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, pointed out that the Commission had deleted the text of paragraph (f) at its previous session; the Drafting Group had therefore added "[missing]" to indicate that fact. In paragraph (j), the words "an amendment or" had been added, and immediately after paragraph (j), a paragraph defining "banking day" had been added. In paragraph (k), the Drafting Group had deleted a phrase which had appeared in the earlier text.

13. Mr. LE GUEN (France) pointed out that in the French version of subparagraph (n), "valeur dans le temps" had been incorrectly changed to "valeur de rendement".

14. Paragraphs (f) to (n) were adopted.

Article 2 bis

15. Article 2 bis was adopted.

Article 3

16. Article 3 was adopted.

Article 4

17. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, pointed out that "amendment or" had been added in paragraphs (1), (2) and (5), and that paragraph (3) had been redrafted in line with the suggestions of the secretariat as contained in paragraph 47 of document A/CN.9/367. He explained that the purpose of the procedure referred to in paragraph (5) was to detect discrepancies, such as might arise, for example, from a mistake made by the sender or from some problem in transmission. The Drafting Group had felt that the word "error" alone might have narrowed the concept, and therefore "or discrepancy" had been added in several places.

18. Article 4 was adopted.

Article 5

19. Article 5 was adopted.

Article 6

20. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the only change in article 6 was the addition of the word "or" for stylistic reasons at the end of paragraph (2) (d).

21. Article 6 was adopted.

Article 7

22. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the Drafting Group had seen no way to shorten paragraph (3), but had made some changes in the interests of clarity. The beginning had been changed to read: "A receiving bank that determines ...", and various small alterations had been made to reflect that changed syntax. The phrase "before the end of the execution period" had been placed after "paragraph (2) if", and "in the light of the circumstances" had been deleted as redundant. In paragraph (5), "of this article" had been added to the end of the last sentence, in the interests of greater clarity.

23. Article 7 was adopted.

Article 8

24. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the only change made in article 8 was the addition of "or" at the end of paragraph (1) (g).

25. Article 8 was adopted.

Article 9

26. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the wording "that identifies the beneficiary" in paragraph (4) had been changed to "intended to identify the beneficiary", because the point of the paragraph was that the information did not, in fact, identify the beneficiary. In paragraph (5), "his" had been changed to "its".

27. Mr. SANDOVAL (Chile) said that in paragraph (3) "la cuantía de dinero" should be replaced by "la suma de dinero".

28. Article 9 was adopted.

Article 10

29. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the changes made in paragraph (1) were based on the suggestions of the secretariat contained in document A/CN.9/367, but were not identical to them. The phrase "that is obligated to execute a payment order"

(Mr. Bergsten)

had been added, as article 10 covered only the time period within which an obligation had to be discharged, not the imposition of the obligation itself. The second sentence had been modified and split into two sentences. In subparagraphs (a) and (b), "order" had been changed to "payment order" several times; in subparagraph (b), "in which case" had been deleted and "the order shall be executed on that date" had been added.

30. Mr. SANDOVAL (Chile) pointed out a minor typographical error in the Spanish version of paragraph (1).

31. Mr. DE BOER (Observer for the Netherlands) asked whether article 10, as it stood, covered the situation in which the obligation of the bank arose later than the date of receipt.

32. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, explained that a receiving bank became obligated to execute a payment order because of its acceptance thereof, and from the moment of acceptance. But the point in time at which it was obligated to execute was determined by article 10. The time period ran not from acceptance, but from receipt. A situation in which acceptance occurred after receipt was covered by the first two sentences of article 10 (1). If acceptance occurred later, there was indeed a problem, which had been discussed at length in document A/CN.9/367.

33. Mr. DE BOER (Observer for the Netherlands) suggested that a wording might be found to cover the problem.

34. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, recalled that the problem raised by the observer for the Netherlands was one of the issues which the Commission had decided not to attempt to resolve. It was, in any event, likely to be a relatively rare situation.

35. Mr. LE GUEN (France) recalled that the delegation of France was firmly opposed to the substance of paragraph (1 bis), considering that the issue of execution for value was a purely contractual matter with which UNCITRAL should not have concerned itself. He wished to ensure that the views of his delegation were placed on record.

36. The CHAIRMAN said that those views would be placed on record.

37. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that paragraph (1 ter) had been modified in the light of the suggestions made by the secretariat in paragraph 36 of document A/CN.9/367.

38. Mr. LIM (Singapore) asked whether "banking day" should not be used in paragraphs (4) and (5) in place of "day the bank executes that type of payment" and "day it performs that type of action".

39. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that that was a suggestion which had been made, but the Drafting Group had not made the change.

40. Mr. DE BOER (Observer for the Netherlands) asked, relative to paragraph (4), whether the Drafting Group had considered the relationship between the banking day and the cut-off time, and whether there could also be a cut-off time within a banking day.

41. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, referred to the definition of "banking day" in article 2. The question raised by the observer for the Netherlands had been discussed in the Drafting Group, which had recognized that in some banking systems, each new banking day began at a given time in the morning, while in others it began as soon as the preceding one ended at a given time in the evening. The problem was covered, at least partially, by the use of the phrase "that part of the day" in the definition.

42. Article 10 was adopted.

The meeting was suspended at 11.30 a.m. and resumed at noon.

Article 11, paragraph (1)

43. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that paragraph (1) incorporated the drafting changes which the Commission had agreed upon the previous week.

44. Paragraph (1) was adopted.

Article 11, paragraph (2)

45. Paragraph (2) was adopted.

Article 11, paragraph (3)

46. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the text had been amended in accordance with the wishes of the Commission. The words "paragraphs (1) and (2)" should read instead "paragraph (1) or (2)".

47. Paragraph (3), as amended, was adopted.

Article 11, paragraph (4)

48. Paragraph (4) was adopted.

Article 11, paragraph (5)

49. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the references to "beneficiary's bank" should be amended to read "beneficiary bank".

50. Paragraph (5), as amended, was adopted.

Article 11, paragraph (6)

51. Paragraph (6) was adopted.

Article 11, paragraphs (6 bis) and (6 ter)

52. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that a sentence had been added in square brackets at the end of paragraph (6 ter) to state explicitly the implicit provision that the paragraph did not apply to a bank if it would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system.

53. Mr. BURMAN (United States of America) said that the bracketed text did not represent a substantive change, and merely served to clarify the position of the Drafting Group so as to prevent any possible misunderstanding at a later time.

54. The CHAIRMAN suggested that the square brackets should be deleted.

55. It was so decided.

56. Mr. BONELL (Italy) suggested that the sentence which concluded both paragraphs (6 bis) and (6 ter) should be moved to a separate paragraph in the article.

57. It was so decided.

58. Paragraphs (6 bis) and (6 ter), as amended, were adopted.

Article 11, paragraphs (7) to (9).

59. Paragraphs (7) to (9) were adopted.

Article 12

60. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the word "procedure" in the first sentence should be in the plural. The addition of the second sentence reflected the decision of the Drafting Group to state explicitly that a receiving bank's failure to fulfil its obligations under article 12 would not give rise to any liability.

61. Mr. DE BOER (Observer for the Netherlands) said that he could not recall a decision being taken by the Drafting Group to state that explicitly.

62. The CHAIRMAN said that during its consideration of the article the previous week, the Drafting Group had indeed taken a decision that the article would not give rise to any liability.

63. Mr. SCHNEIDER (Germany) said that he shared the reservations of the observer for the Netherlands with respect to article 12. The second sentence constituted a substantive provision on which there had been no conclusive discussion. It should therefore be omitted from the article.

64. Mr. LE GUEN (France) said that a distinction should be drawn between a decision not to provide sanctions and an explicit provision that no liability would arise if a receiving bank failed to comply with its obligations. He therefore shared the concerns of the representative of Germany and the observer for the Netherlands.

65. Mr. GREGORY (United Kingdom) said that the Commission had not reached any conclusion on the second sentence of article 12.

66. Mr. BONELL (Italy) said that the sentence made no sense whatsoever; he strongly urged the Commission to delete it.

67. Mr. EL-SHARKAWY (Egypt) proposed that, in the first sentence of article 12, the words "under a duty" should be replaced by "requested", and the second sentence should be deleted.

68. Mr. EWORE (Observer for Gabon), Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) and Mr. BURMAN (United States of America) supported the proposal made by the representative of Egypt.

69. Ms. BUURE-HAGGLUND (Observer for Finland) said that the Egyptian proposal to amend the first sentence of article 12 would weaken the content of that article. In her opinion, the only correct way to proceed would be to delete the second sentence.

70. Mr. GREGORY (United Kingdom) said that his delegation agreed with the observer for Finland. Moreover, it was odd for a law to contain a request. He proposed that the Commission either should decide to delete the second sentence of article 12 or should reword the article to indicate that there was no liability.

71. Mr. CHATURVEDI (India) proposed that the Commission should delete the second sentence, leaving the first sentence intact.

72. Mr. GRIFFITH (Observer for Australia) suggested that the first sentence of article 12 should be amended to read: "Without giving rise to any liability, until the credit transfer is completed, each receiving bank should assist the originator ...". The second sentence should be deleted.

73. Mr. DUCHEK (Austria) said that the second sentence of article 12 was indeed very odd. A law that only requested something to be done was also quite unusual. The inclusion of such a provision in the Model Law would enable States that had always been sceptical about the Model Law to belittle its importance. The best solution would be to abide by the decision taken by the Commission at its previous session. Another solution would be to delete the second sentence.

74. Mr. DE BOER (Observer for the Netherlands), Mr. GREGORY (United Kingdom) and Mr. HOLEC (Czechoslovakia) supported the Australian suggestion.

75. Mr. LOJENDIO (Spain) said that the Spanish text of the first sentence of article 12 presented fewer problems than did the English text. He was in favour of retaining the first sentence as it stood, at least in the Spanish version, and deleting the second sentence.

76. Mr. FUJISHITA (Japan) said that his delegation could support either the Egyptian or the Australian formula.

Article 13, paragraphs (1) to (3)

77. Paragraphs (1) to (3) were adopted.

Article 13, paragraphs (4) and (5)

78. Mr. BONELL (Italy) suggested that the sentence which concluded both paragraphs (4) and (5) should be moved to a separate paragraph in the article.

79. It was so decided.

80. Paragraphs (4) and (5), as amended, were adopted.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD (PARTIAL)* OF THE 482nd MEETING

Held at Headquarters, New York,
on Wednesday, 13 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL-ZAMORA (Mexico)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

* No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 3.20 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367; A/CN.9/XXV/CRP.2/Add.2)

Article 12

1. The CHAIRMAN recalled that at the previous meeting, the representative of Egypt had proposed, as a compromise solution, that the words "under a duty" should be changed to "requested" and that the last sentence should be deleted. He appealed to members of the Commission to adopt that proposal in a spirit of compromise.

2. Article 12, as amended, was adopted

Article 14

3. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the Drafting Group had added the words "other than as a result of the deduction of its charges" to article 14, since the original text seemed to imply that a bank which deducted charges would still be obligated to issue a payment order for correction of underpayment.

4. Article 14 was adopted.

Article 15

5. Article 15 was adopted.

Article 16

6. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that paragraphs (1) and (2) had been redrafted on the basis of the proposal made by the representatives of the United Kingdom and Finland, which the Commission had accepted. In addition, the Drafting Group had deleted the phrase "other than the beneficiary's bank" following the words "a receiving bank" in paragraph (1) because of the possibility the the text might be misread; the meaning was clear from the context. The words "fails to comply" had been changed to "does not comply" because the word "fails" could imply that a subjective criterion was involved. The reference to article 17 (1) had been deleted, the word "failure" had been changed to "non-compliance" and the original third sentence had been deleted.

7. In paragraph (2), the words "of the transfer" had been deleted, since they were thought to be redundant. There had been some doubt in the Drafting Group as to whether the Commission had approved paragraph (2 ter); consequently that paragraph had been included, without changes, in square brackets.

(Mr. Bergsten)

8. In paragraph (3), the reference to article 7 (3), and the phrase "other than the beneficiary's bank" had been deleted. Finally, a new sentence had been added at the end of paragraph (7).

9. Ms. BURRE-HÄGGUND (Observer for Finland) said that, under the basic liability scheme set out in paragraphs (1) and (2), interest deriving from a delay in the completion of a credit transfer should go to the beneficiary. Paragraph (2 ter) provided a subsidiary rule for situations in which the beneficiary did not automatically receive the interest to which he was entitled. In such a situation, the beneficiary could try to determine which bank in the chain had caused the delay or failed to pass on interest, or could claim interest from the originator on the basis of the rules governing the underlying contract. If the beneficiary decided to follow the latter course, the originator needed to recover the interest to which the beneficiary would have been entitled. The purpose of the paragraph then, was to ensure that the interest loss was not borne by the originator, when the delay was caused by one of the banks in the transfer chain.

10. Mr. BHALA (United States of America) said that he opposed the inclusion of paragraph (2 ter) in article 16 because it put the burden of recovering lost interest on the originator; who would have to look upstream in the credit-transfer chain to determine which bank had caused the delay. That was an unwarranted interference in the originator-beneficiary relationship, which many delegations seemed to feel was a matter best left to local law. There would only be a small number of cases in which the originator decided to pay interest to the beneficiary instead of referring to article 16 (1).

11. The paragraph also posed a problem of moral hazard by encouraging banks to delay a credit transfer in the hope that the originator would pay interest to the beneficiary. While paragraph (1) put pressure on banks to keep the credit transfer moving quickly, paragraph (2 ter) weakened that pressure. Paragraph (2 ter) might have other undesirable effects: on the basis of the underlying contract, the originator might claim, not just interest, but also fees or penalties from banks in the chain.

12. Mr. GREGORY (United Kingdom) said that most members of the Drafting Group had believed that the Commission had already approved paragraph (2 ter). It was indicated in paragraph 6 of the Commission's draft report to the General Assembly (A/CN.9/XXV/CRP.1/Add.1) that after discussion, the Commission adopted the substance of the proposed paragraphs (1) and (2 ter) and had referred them to the Drafting Group.

13. Paragraph (2 ter) was needed because the beneficiary would always find it easier to recover interest from the originator, if the contract gave that right, than to invoke article 16 (1). The objective of the paragraph was to relieve the originator of liability and make it clear that liability lay with the bank that had caused the delay. The paragraph did not interfere with the originator-beneficiary relationship since it did not indicate whether the

(Mr. Gregory, United Kingdom)

beneficiary had the right to claim interest from the originator, but dealt only with the situation in which the beneficiary exercised that right, and related strictly to the bank that had caused the delay.

14. The problem of moral hazard was more likely to arise if paragraph (2 ter) was omitted. If the beneficiary exercised his rights under the underlying contract, the originator might have rights of subrogation under ordinary law, and the situation would be much less clear. Instead of paying interest to the beneficiary and the originator, a bank might withhold the interest and allow the beneficiary to sue the originator, because rights of subrogation were difficult to enforce. A clear rule was needed requiring a bank to give up interest to the beneficiary, or to the originator if the beneficiary first applied to the originator. As to the question of excessive claims, paragraph (2 ter) clearly referred only to the interest the beneficiary would have been entitled to.

15. Mr. DE BOER (Observer for the Netherlands) said that he also supported the inclusion of paragraph (2 ter). If it was not included, problems might arise in respect of subrogation, which was not always an automatic right. There could also be difficulties in countries having systems of statutory interest, which was generally higher than bank interest.

16. Mr. GRIFFITH (Observer for Australia) said that the provision was useful, particularly as there was no clear right of subrogation in civil-law countries.

17. Mr. CHATURVEDI (India) and Mr. SCHNEIDER (Germany) said that they also supported the inclusion of paragraph (2 ter).

18. The CHAIRMAN urged the United States delegation to accept paragraph (2 ter), on the understanding that its view would be fully reflected in the Commission's report to the General Assembly.

19. Article 16 was adopted.

Article 16 bis

20. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that article 16 bis comprised former paragraph (8) of article 16. Its topic, the exclusivity of remedies, had been judged important enough to warrant a separate article. The first sentence of the former paragraph (8) had been eliminated, as the Drafting Group, after considerable discussion, had concluded it no longer served any purpose, the relevant rights and obligation being set out in the Model Law.

21. The words "in respect of non-compliance with articles 7 or 9" had been inserted after the words "shall be available" in the new article simply in order to make the scope of the remedies provided explicit. Otherwise, only minor drafting changes had been made.

22. Mr. BURMAN (United States of America) proposed a further drafting change that had already been discussed by the members of the Drafting Group: instead of "articles 7 or 9", the article might read "the obligations dealt with in article 16".

23. Mr. SCHNEIDER (Germany) said that the wording suggested did not have quite the same meaning as the wording it would replace - article 16 dealt with other articles than just 7 and 9.

24. Mr. DUCHEK (Austria) said that he found the proposed drafting technically deficient, since it did not specify the nature of the obligations referred to, which were essentially to pay interest under certain circumstances.

25. Mr. CHATURVEDI (India) noted that India had opposed the concept of exclusivity of remedies as contrary to the common-law system of judicial review of remedies. His delegation therefore did not favour the creation of a separate article 16 bis. Those considerations apart, the change proposed by the representative of the United States was acceptable.

26. Mr. LIM (Singapore) said that he opposed the United States proposal reluctantly. Like the representative of Austria, he found the drafting deficient in that it did not make clear what obligations were referred to.

27. Moreover, article 16 (6) referred to the liability of the beneficiary's bank towards the beneficiary, which was also an obligation dealt with in article 16. Therefore, the proposed wording represented a substantive change.

28. The CHAIRMAN suggested that the representative of the United States should withdraw his proposal.

29. Mr. BURMAN (United States of America) withdrew his proposal, which his delegation had put forward to facilitate statutory drafting in systems such as its own. The intent had not been to alter the substance of the article.

30. Article 16 bis was adopted.

Article 17

31. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that former paragraph (2) of article 17 had been deleted and placed in a footnote to article 17, in accordance with the Commission's wishes. Accordingly, the title of the article had been changed to "Completion of credit transfer", eliminating the reference to discharge of obligation. In paragraph (3) the words "shall be considered complete" had been replaced by "is completed".

32. Mr. ALVAREZ (Uruguay) noted that the introductory formula for the footnote to chapter I was the same as that for the footnote to article 17 except that it included the word "additional" between the words "following"

(Mr. Alvarez, Uruguay)

and "text". He proposed its removal so that the two introductions would be identical.

33. The CHAIRMAN said he would take it that the Commission agreed to the proposal of the representative of Uruguay.

34. Mr. SCHNEIDER (Germany) said that the report should duly reflect the strong opposition among members of the Commission to the provisions that had been placed in footnotes.

35. Article 17 was adopted.

36. The CHAIRMAN invited the Commission to adopt the draft Model Law on International Credit Transfers as a whole.

37. The Model Law, as a whole, was adopted.

38. Mr. CHATURVEDI (India) said he wished to put on record that the documents prepared by the secretariat, although issued too late to stimulate broad discussion, had raised some very good points and should receive further consideration.

The discussion covered in the summary record ended at 4.40 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 483rd MEETING

Held at Headquarters, New York,
on Friday, 15 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

Adoption of the report of the Commission

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The meeting was called to order at 10.40 a.m.

ADOPTION OF THE REPORT OF THE COMMISSION (A/CN.9/XXV/CRP.1 and Add.1-13)

1. Mr. DUCHEK, (Austria), Rapporteur, introducing the draft report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its twenty-fifth session (A/CN.9/XXV/CRP.1 and Add.1-13), said that, in the second line of paragraph 6 of document A/CN.9/XXV/CRP.1, "Cuba" should be added after "Côte d'Ivoire".

2. In document A/CN.9/XXV/CRP.1/Add.5, the following should be inserted after the last sentence of paragraph 53:

"Index

53a. The Commission noted that the Secretariat would prepare an index to the Legal Guide."

3. In document A/CN.9/XXV/CRP.1/Add.12, at the end of the last sentence of paragraph 6, the words "and the Commission expressed gratitude to those speakers for their readiness to contribute to the Congress," should be added. In paragraph 13 of that document, the last sentence should read: "The session would be held from 4 to 15 January 1993."

4. In document A/CN.9/XXV/CRP.1/Add.13, in the first line of the footnote, the word "may" should replace "might".

Introduction (A/CN.9/XXV/CRP.1)

5. The introduction was adopted.

Chapter I (A/CN.9/XXV/CRP.1)

6. Chapter I was adopted.

Chapter II (A/CN.9/XXV/CRP.1 and Add.1-3)

7. Mr. BURMAN (United States of America) said that, in the third sentence of paragraph 5 of document A/CN.9/XXV/CRP.1/Add.1, the words "might have" should be deleted, since the Commission had not agreed on that wording.

8. Mr. DUCHEK (Austria), Rapporteur, said that document A/CN.9/XXV/CRP.1/Add.4 would reflect the discussion that the Commission had held on the subject.

9. Mr. BURMAN (United States of America) proposed that a footnote should be included in paragraph 5, referring the reader to the relevant text in document A/CN.9/XXV/CRP.1/Add.4.

10. Mr. CHATURVEDI (India) proposed that the following sentence should be inserted after the third sentence of paragraph 17 of document A/CN.9/XXV/CRP.1/Add.1:

> "It was also stated that this exclusion of remedies will be contrary to the system of judicial review found in certain systems of law and will therefore be illegal."

11. The Indian proposal was adopted.

12. Mr. BURMAN (United States of America) said that, after the third sentence in paragraph 18, the following sentence should be inserted: "However, the view was expressed that analogies to these conventions were inappropriate, since credit transfers involved very high volumes of transactions at high speed and in other ways were quite different."

13. Mr. DUCHEK (Austria), Rapporteur, said that, if the United States proposal was adopted, the sentence following that addition should begin: "In opposition to the current text it was further stated ...".

14. Both proposals were adopted.

15. Mr. FUJISHITA (Japan) proposed that, after the fifth sentence of paragraph 7 of document A/CN.9/XXV/CRP.1/Add.2, the following sentence should be added:

> "It was also pointed out that international conventions concerning negotiable instruments, including the United Nations Convention on International Bills of Exchange and International Promissory Notes, do not contain any such provision."

16. Mr. BURMAN (United States of America) said that the sentence proposed by the representative of Japan should be followed by the sentence:

> "It was, however, also stated that a reference to that Convention was inappropriate because of the significant difference in subject-matter and the provisions therein."

17. Both proposals were adopted.

18. Mr. DUCHEK (Austria), Rapporteur, said he hoped that the representatives of Japan and the United States of America would give the secretariat some leeway with respect to the exact wording and placement of the two additional sentences.

19. Mr. FUJISHITA (Japan) proposed that the third sentence of paragraph 9 of document A/CN.9/XXV/CRP.1/Add.2 should be replaced by the following:

> "It was also stated that, in view of the fact that the Model Law had been drafted so as to protect banks against receiving funds at the bank they might not approve of because of its credit risk, a similar protection should be given to the beneficiary".

20. Mr. BHALA (United States of America) proposed that, if the Japanese amendment was adopted, the following sentence should be added immediately afterwards: "In opposition to this view, it was noted that the Model Law does not deal with credit risk matters."

21. Both proposals were adopted.

22. Mr. BURMAN (United States of America) proposed that the following sentence should be added at the end of paragraph 17 of document A/CN.9/XXV/CRP.1/Add.2:

> "It was also noted that two different credit transfers were involved, and the parties played different roles in each transfer. Therefore it was argued that no conflict existed."

23. The proposal was adopted.

The meeting was suspended at 11.40 a.m. and resumed at 12.05 p.m.

24. Mr. GREGORY (United Kingdom) proposed that the last sentence of paragraph 18 of document A/CN.9/XXV/CRP.1/Add.2 should be amended to read: "After discussion, the Commission agreed that article 5 should be modified and referred the matter to the Drafting Group."

25. The proposal was adopted.

26. Mr. SCHNEIDER (Germany) proposed that the following sentence should be inserted at the beginning of paragraph 2 of document A/CN.9/XXV/CRP.1/Add.3:

> "In discussing article 18, different views were expressed as to whether a provision about conflict of laws was needed and desirable or not."

27. Mr. CHATURVEDI (India) proposed that the beginning of paragraph 5 should be amended to read: "Since no consensus was reached on the deletion or retention of article 18, the Commission decided ...". Paragraphs 6 and 7 should be deleted.

28. The CHAIRMAN noted that the compromise solution adopted by the Commission had been to approve paragraphs (1), (2) and (3) of article 18, but place them in a footnote.

29. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) supported the German proposal.

30. Mr. BURMAN (United States of America) also supported the German proposal. He pointed out that its adoption would resolve the issue raised by the Indian representative.

31. The German proposal was adopted.

32. Mr. CHATURVEDI (India) proposed that a sentence should be added at the end of paragraph 9 of document A/CN.9/XXV/CRP.1/Add.3, stating that one delegation had felt that a definition of "beneficiary's bank" would be useful.

33. Mr. BURMAN (United States of America) proposed the following addition at the end of the penultimate sentence of paragraph 12: "notwithstanding a view that the current text could be interpreted correctly as not applicable to a beneficiary's bank".

34. Mr. GREGORY (United Kingdom) said that if such an addition was made, the word "correctly" should not be included.

35. Mr. BURMAN (United States of America) proposed the addition of an extra sentence at the end of paragraph 12:

> "It was pointed out, however, that a beneficiary's bank under article 8 simply accepts or rejects a payment order, and then incurs the obligations set forth in article 9."

36. Mr. GREGORY (United Kingdom) said that if the sentence was added, then a further addition should be made immediately afterwards: "The view was expressed that the word 'execution' was apt to cover that situation."

37. Mr. BURMAN (United States of America) proposed that an extra phrase should be added at the end of paragraph 13: "although a view was expressed that a beneficiary's bank does not 'execute' payment orders".

38. Mr. GREGORY (United Kingdom) said that he did not understand the reason for such an addition.

39. Mr. BURMAN (United States of America) explained that paragraphs (1 bis) and (1 ter) of article 10 dealt with subjects which were different from those covered in paragraph (1): the proposed addition was intended to clarify that point.

40. Mr. GREGORY (United Kingdom) pointed out that paragraph 13 of document A/CN.9/XXV/CRP.1/Add.3 dealt with the issue of value dates, not execution, and he did not recall that the delegation of the United States had made any such observations during the discussions.

41. Mr. BHALA (United States of America) said that he had made that very point with respect to paragraphs (1 bis), (1 ter) and (1) of article 10.

42. Ms. BUURE-HAGGLUND (Observer for Finland) said that the report was intended to reflect the discussions in a general way. If every delegation wished its views to be noted on every specific issue, then the report would become unbalanced.

43. The CHAIRMAN urged delegations to keep their amendments to a minimum, in the light of the concerns expressed by the Observer for Finland. If, however, any delegation had strong views on a particular issue, then it was at liberty to have those views recorded.

44. Mr. GREGORY (United Kingdom) suggested a wording which would express the concerns of the United States, while at the same time avoiding an excess of individual comments, namely the addition at the end of paragraph 13 of the following words: "although differing views were expressed on the extent to which these paragraphs were capable of applying to the beneficiary's bank."

45. Mr. BURMAN (United States of America) said that he agreed with the wording put forward by the representative of the United Kingdom. He shared the concern of the observer for Finland that the report should not become unbalanced, and stressed that his delegation was not raising every issue on which its views differed from the consensus, but only those on which it felt particularly strongly.

46. The United Kingdom proposal was adopted.

47. Mr. FUJISHITA (Japan) said that paragraph 16 of document A/CN.9/XXV/CRP.1/Add.3, which was intended to reflect his own statement, did not accurately do so. He proposed that the paragraph should read:

> "A view was expressed, in connection with article 4 (2), that there was uncertainty in the meaning of 'comparison of signature' as to whether it includes also a case where both signatures and seals are compared. That method was frequently used in the banking practice of some States for the authentication of paper-based credit transfers. In view of the fact that such a method was widely used in the banking practice of some States, it was said to be desirable to expressly exclude this case from the application of 'comparison of signature'. The Commission, recalling its discussion of the issue at its previous session, decided that the text should remain unchanged."

48. The proposal was adopted.

49. Chapter II, as amended, was adopted.

Chapter III (A/CN.9/XXV/CRP.1/Add.5)

50. Mr. CHATURVEDI (India), supported by the representative of Italy, suggested deletion of the words "while not endorsing or encouraging the conducting of international trade through countertrade" from paragraph 7 of document A/CN.9/XXV/CRP.1/Add.5.

51. Mrs. FLINT (United Kingdom), supported by the representative of the United States, said that she would have no objection to the deletion of those words from the draft recommendation, but felt that as a reflection of the Commission's conviction, they should remain in the section of the report dealing with the general discussion.

52. Mr. BONELL (Italy) pointed out that paragraph 7 did not record that one delegation or another had expressed a view on endorsement or encouragement of countertrade. On the contrary, the paragraph started with the words "The Commission". At the very least, he recommended deletion of "endorsing or".

53. Mr. HUNJA (Kenya) said that many delegations would not take the view that the Commission should not encourage countertrade. He felt that the entire phrase should be deleted.

54. Mr. BURMAN (United States of America) recalled that the concept of neither endorsing nor encouraging countertrade, had been expressed by the Chairman himself, and had not drawn any comment from the floor. The phrase should therefore be retained.

55. Ms. BUURE-HAGGLUND (Observer for Finland) pointed out that paragraph 7 did not say that the Commission neither endorsed nor encouraged countertrade; it said that the Legal Guide neither endorsed nor encouraged countertrade. There had been a long discussion two years previously as to whether the Guide should take a position on countertrade, and the decision had been that it should be neutral.

56. Mrs. FLINT (United Kingdom), supported by the representative of Germany, agreed with the observer for Finland. Deletion of the words "endorsing or" might be an acceptable compromise.

57. Mr. HUNJA (Kenya) proposed that in order to have a more balanced wording, the paragraph should read: "... while not encouraging or discouraging ...".

58. The proposal was adopted.

59. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that in paragraph 33 of the French version of document A/CN.9/XXV/CRP.1/Add.5, the word "juridictions" was incorrect, even though the English word "jurisdictions" was appropriate. He suggested that "juridictions" should be replaced by "systèmes de conflit".

60. It was so decided.

61. Mr. BONELL (Italy) recalled, with respect to paragraph 48, that the Commission had decided that it would not be appropriate to refer expressly to adoption of legislation incorporating the Model Law. He therefore proposed that the phrase "or whether a State adopted legislation incorporating the UNCITRAL Model Law" should be deleted, and any necessary grammatical changes made also.

62. The proposal was adopted.

63. Chapter III, as amended, was adopted.

The meeting rose at 1.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 484th MEETING

Held at Headquarters, New York,
on Friday, 15 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL-ZAMORA (Mexico)

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Adoption of the report of the Commission (continued)

Closure of the session

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference Services, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 3.15 p.m.

ADOPTION OF THE REPORT OF THE COMMISSION (continued) (A/CN.9/XXV/CRP.1 and Add.1-13)

Chapters IV, V, VII and XI (A/CN.9/XXV/CRP.1/Add.6, Add.7, Add.9 and Add.11)

1. Chapters IV, V, VII and XI were adopted.

Chapter XII (A/CN.9/XXV/CRP.1/Add.12)

2. Mrs. FLINT (United Kingdom) recalled that when the Commission had considered the recommendation contained in paragraph 3 of General Assembly resolution 46/56 B, her delegation had taken the view that assistance provided to developing countries to attend meetings should be considered in the light of the overall budget. She therefore suggested that the following sentence should be added at the end of paragraph 4: "A view was expressed that such assistance would have to be considered in the context of the overall budget."

3. Mr. BURMAN (United States of America) said that since a number of delegations, including his own, had agreed with the view expressed by the representative of the United Kingdom, the words "a view" should be changed to "the view". He also proposed that the following sentence should be inserted after the sentence proposed by the representative of the United Kingdom: "It was also stated that recommendations on this subject might require consideration by the Fifth Committee of the General Assembly."

4. Mr. ALVAREZ (Uruguay) said that a sentence should be added at the end of paragraph 3 indicating that some delegations had expressed the view that it would be necessary to make an in-depth study of the question of rationalization of the work of the Commission.

5. Mr. KOMAROV (Russian Federation) pointed out that paragraph 12 contained no indication of the venue of the fifteenth session of the Working Group on the New International Economic Order.

6. The CHAIRMAN said that the secretariat would take note of the points raised in connection with chapter XII.

7. Chapter XII was adopted.

Chapter II (A/CN.9/XXV/CRP.1/Add.4)

8. Mr. DUCHEK (Austria), Rapporteur, said that the following sentence should be added at the end of paragraphs 2 and 10: "The Commission was agreed therefore to replace, in the opening phrase of the footnote, the words 'decided to provide' and 'may' by the words 'suggests' and 'might', respectively." In the second sentence of paragraph 10, the words "the text

(Mr. Duchek, Austria)

should make it clear that no consensus had been reached as to" should be changed to "the reason for placing paragraph 2 in a footnote was the lack of consensus on", and the word "itself" should be added at the end of the sentence. Lastly, in paragraph 2 of the decision contained in paragraph 11, which had been drafted by the secretariat at the Commission's request, the words "of the United Nations Commission on International Trade Law" should be deleted.

9. Mr. BURMAN (United States of America) said that if the new sentence was included in paragraphs 2 and 10, there should be some indication that there had been consensus in the Commission on placing the text in a footnote. He therefore proposed that the words "by consensus of the Commission" should be added at the beginning of the new sentence which the Rapporteur had read out.

10. Mr. HERRMANN (Secretary of the Commission) said that the wording read out by the Rapporteur should remain as it was, since if the Commission was agreed, it was necessarily by consensus.

11. Mr. SCHNEIDER (Germany) said that, within the Commission, the word "agreed" had always meant "agreed by consensus". To make that explicit in a particular paragraph could raise doubts in respect of other parts of the document.

12. The CHAIRMAN said that during the Commission's discussion of the draft Model Law on International Credit Transfer no consensus had been reached on including or deleting the provision in question. The Commission had thus compromised by placing that provision in a footnote, and the adoption of the report was not the time to discuss whether or not consensus had been reached. Accordingly, the text should remain as read out by the Rapporteur.

13. Mr. BURMAN (United States of America) proposed that paragraph 3 should reflect his delegation's position fully with the inclusion of the following sentence: "That issue was stated by one delegation to be an important banking supervisory concern due to recent events concerning international banking problems." His proposal was motivated by a recent international case to which it was unnecessary to refer more precisely.

14. The CHAIRMAN said that the secretariat would add the appropriate language.

15. Chapter II, as amended, was adopted.

Chapter VI (A/CN.9/XXV/CRP.1/Add.8)

16. Chapter VI was adopted.

Annex I (A/CN.9/XXV/CRP.1/Add.13

17. Mrs. JAMMETTI GREINER (Observer for Switzerland) noted that the title of article 17 in the French text of the Model Law was "Responsabilité" only, with

(Mrs. Jammetti Greiner, Observer, Switzerland)

no mention of interest, as in the English and Spanish versions. A more faithful translation should be sought.

18. Mrs. AUGIER (France) agreed with the Observer for Switzerland and added that on reading the entire text in French, she had found a number of errors. Her delegation would submit proposed corrections to the secretariat, whose efforts, however, had already resulted in a greatly improved draft.

19. Annex I was adopted.

Chapter VIII (A/CN.9/XXV/CRP.1/Add.10)

20. Mr. HERRMANN (Secretary of the Commission) said that the words "the national correspondents and" should be inserted after the word "congratulated" in paragraph 2.

21. Chapter VIII was adopted.

Adoption of the report as a whole

22. The report as a whole was adopted.

CLOSURE OF THE SESSION

23. The CHAIRMAN said that the Commission had thus concluded the work of its twenty-fifth session.

The meeting rose at 5 p.m.